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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PEDRO ANTONIO PEREZ, Defendant and Appellant.	D053188 (Super. Ct. No. JCF20802)

APPEAL from a judgment of the Superior Court of Imperial County, Barrett J. Foerster, Judge. Affirmed in part, reversed in part and remanded for resentencing.

A jury convicted Pedro Antonio Perez of second degree vehicle burglary (Pen. Code, § 459) and misdemeanor vandalism (*id.*, § 594, subd. (a)). The trial court sentenced him to three years in prison.

Perez appeals contending that his burglary conviction must be reversed because there was insufficient evidence to support the jury's verdict. As discussed below, we agree.

FACTS

On January 20, 2007, Jose Diaz drove an Acura Legend to a ranch on Cady Road outside of Brawley. Diaz parked the car in a dirt lot, locked it and departed. Diaz left a kit containing insulin and one or two syringes inside the car.[1]

Victor Cazares lived at the ranch and was working on a Jeep when he saw Diaz, who he knew, park the Acura around 8:00 or 9:00 a.m. behind a motor home. Around noon, two men drove up in a small car and parked. Cazares knew one of the men as "Jesse" and the other man, who he identified in court as Perez, as "Bogart." Jesse asked Cazares for Diaz, while Perez walked around behind the motor home.[2]

Cazares's view of the Acura was blocked by the motor home, but he heard the sound of rocks hitting a car while Jesse was talking to him. Jesse then followed Perez out of Cazares's view behind the motor home. More bangs followed at a "faster" pace.

Perez and Jesse returned to their vehicle and departed. Cazares testified that Perez "wasn't carrying anything with him" when he left. After Perez and Jesse left, Cazares

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1 Diaz is a diabetic who takes insulin with him wherever he goes.

2 Cazares testified on direct examination that both Jesse and Perez asked for Diaz and then went to Diaz's car. Cazares was impeached in cross-examination with his earlier statement that only Jesse had asked for Diaz. Cazares then provided the above testimony, which we accept under standard rules of appellate procedure, as the version of the testimony that is "most favorable to the People." (See *People v. Smith* (2005) 37 Cal.4th 733, 742 [on appeal of conviction, we "view[] the evidence in the light most favorable to the People"].)

walked over to the Acura to see what had happened and saw that the Acura had been "destroyed." Cazares testified that nobody else was in the area of Diaz's car that day.[3]

When Diaz returned to the Acura around 3:00 that afternoon, he discovered that the rear windshield, the driver's side window and both side-view mirrors were smashed, and his insulin kit was missing. He also found a cinder block inside the car.

The parties stipulated that "in October of 2005, Jose Diaz, the victim in this case, testified at a preliminary hearing against Mr. Perez. [Diaz] was also the victim in that case. That case was dismissed in December of 2005."

DISCUSSION

Perez contends that the evidence was insufficient to support the jury's verdict with respect to the conviction for second degree burglary. Specifically, he argues that there is not substantial evidence that Perez, as opposed to Jesse (or some unknown passerby), entered Diaz's car and took the insulin kit. Perez also contends that even if he is responsible for the theft, there is no evidence that he possessed the intent to steal at the time of his entry into Diaz's car as required for a burglary conviction. Perez does not challenge his vandalism conviction.

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[3] Cazares testified that during the time that Diaz was gone, from approximately 9:00 a.m. until 3:00 p.m., no one else went near the car. Cazares testified that during that period, he was working on a car nearby, although he occasionally turned his back on Diaz's vehicle.

A. *Procedural History*

At the close of the prosecution's case, defense counsel moved for a directed verdict on the burglary charge on the ground that there was no evidence that Perez, as opposed to Jesse or some other person, committed a theft. The court denied the motion.

In closing argument, the prosecutor argued that Perez was guilty of burglary, without distinguishing between Perez and Jesse. The prosecutor argued: "No one else had access to that car that day but Jesse and the defendant, Bogart."

Following closing argument, the court instructed the jury with the following elements of vehicle burglary: (1) "The Defendant entered a locked vehicle"; and (2) "when he entered the locked vehicle he intended to commit theft." The court's instructions also stated: "A burglary was committed if the defendant entered with the intent to commit theft"; and "[y]ou may not find the defendant guilty of burglary unless you all agree that he intended to commit theft at the time of entry."

On the second day of deliberations, the jury sent out the following note:

> "There were two people present during the crime. Can the defendant be found guilty if he is found to participate in the burglary without being the person who actually took custody of the property?"

In response to the note, the prosecutor suggested that the trial court instruct the jury on the legal theory of aiding and abetting. The prosecutor stated, "[I]t's standard law that when two people participate in a crime they're equally guilty of each other's actions. It's standard accessory — although, I grant it, the jury was not instructed on it." The court responded, "You're stuck with the instructions that you have." In accordance with its comment, the court responded to the jury's note by referring the jurors to the earlier

instruction regarding the elements of burglary. (See *People v. Thompkins* (1987) 195 Cal.App.3d 244, 253 [cautioning trial courts to avoid "merely repeat[ing] for a jury the text of an instruction it has already indicated it doesn't understand"].)

B. *The Evidence Is Insufficient to Support the Burglary Conviction*

In conducting our review of the record for substantial evidence, we "'review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 630.) Particularly significant for our conclusion in this case, we must view the jury's verdict in light of the instructions it received, as we "cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 (*Kunkin*) [concluding that substantial evidence did not support jury verdict even though evidence might have been sufficient under theory on which the jury was not instructed]; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1145 ["It would deprive the defendant of his right to a jury trial if an appellate court could [affirm a conviction] on a theory not presented to the jury" (citing *People v. Abbott* (1933) 132 Cal.App. 109, 114)], disapproved on other grounds by *Baluyut v. Superior Court* (1996) 12 Cal.4th 826.)

In light of the above legal standards, the question in this appeal is whether there was reasonable, credible and solid value evidence that *Perez* (1) entered a locked vehicle and (2) when he did so, he intended to steal Diaz's insulin kit.

The Attorney General's affirmative response to this question depends on multiple inferences. (See *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584 (*Louis & Diederich*) ["a judgment or order may be supported by substantial evidence based upon inferences drawn from inferences"].) While conceding that its evidence is primarily circumstantial, the Attorney General argues that "the fact the insulin kit was missing establishes the theft" and implicit in the theft was an act of "reaching in to take the insulin kit," which establishes entry. (See *People v. Abilez* (2007) 41 Cal.4th 472, 508 [recognizing that "[i]ntent to steal is often proved by circumstantial evidence" and "'[t]here is no better proof'" of such an intent than an actual theft].)

The difficulty with the Attorney General's reasoning is that it fails to provide any nonspeculative basis for concluding that it was Perez rather than Jesse who reached into the vehicle. On this point, the Attorney General has no response, stating only, without citation, "[t]he fact that Jesse might also be guilty does not change appellant's liability." In fact, given the jury's instructions, the possibility that it may have been Jesse *instead of* Perez who reached into the vehicle and stole the insulin kit represents a fatal flaw in Perez's conviction.

Under long-established principles of American jurisprudence, a defendant cannot be convicted under the beyond-a-reasonable doubt standard based on evidence showing

that he is one of two persons likely to have committed a crime.[4] The very purpose of a criminal trial is to establish that it is the defendant, *and not some other person*, who is the actual culprit. (See *In re Zepeda* (2006) 141 Cal.App.4th 1493, 1499 [recognizing that proof that one of two inmates who shared a cell was guilty of possessing contraband, while sufficient to support disciplinary sanction, would "likely be insufficient to form the basis of a criminal conviction"].) Absent such evidence, a verdict is necessarily based on speculation, which is improper. (*People v. Marshall* (1997) 15 Cal.4th 1, 35 ["mere speculation cannot support a conviction"]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"]; *Louis & Diederich*, *supra*, 189 Cal.App.3d at pp. 1584-1585 ["An inference must be the product of logic and reason" and "must rest on the evidence, on probability rather than on speculative possibility or conjecture"].)

It is often the case that, as here, the evidence establishes that a group of persons are complicit in the criminal actions of one member. In such circumstances, the law provides prosecutors with a powerful weapon in the form of the legal theory of aiding and abetting. Under an aiding and abetting theory, all persons acting in concert can be convicted of each other's criminal acts. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1044

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4 Courts are understandably reluctant to place a precise numerical percentage on reasonable doubt, but it is fairly clear that whatever percentage would apply is "much higher" than 50 percent. (*Brown v. Bowen* (7th Cir. 1988) 847 F.2d 342, 345-346 [explaining that the "preponderance standard is a more-likely-than-not rule, under which the trier of fact rules for the plaintiff if it thinks the chance greater than 0.5 that the plaintiff is in the right," while "[t]he reasonable doubt standard is much higher, perhaps 0.9 or better," and "[t]he clear-and-convincing standard is somewhere in between"].)

["an aider and abettor may be liable not only for a crime that, to one's knowledge, one's colleagues are contemplating committing, but also for the natural and reasonable consequences of any act that one knowingly aided or encouraged"].) As the Attorney General recognizes, however, we cannot rely on aiding and abetting principles in the instant case because (apparently through an oversight) the jury was not instructed on this or any other theory of indirect liability.[5] (*Kunkin, supra*, 9 Cal.3d at p. 251; *People v. Smith, supra*, 155 Cal.App.3d at p. 1145.) Without an aiding and abetting instruction, the jury's verdict stands or falls on proof that, in keeping with the jury's instructions, Perez (as opposed to Jesse) reached into the car and took the insulin kit. On this question there is only speculation.[6]

It is significant in this respect that Cazares testified that Jesse was *not* carrying anything when he left Diaz's car. The Attorney General's contention that Perez might have hidden the insulin kit in his clothes provides some response to this weakness in the

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[5] Perez, while acknowledging that there was sufficient evidence to convict him of burglary under an aiding and abetting theory, bases his appellate contention on the fact that the verdict cannot be upheld on that theory. The Attorney General does not address this aspect of the case, but appears to implicitly concede the point, arguing only that "[t]here was substantial, credible evidence, albeit much of it circumstantial, *that it was appellant* who burglarized the Diaz vehicle." (Italics added.) The only explicit comment on this point in the Attorney General's brief is in a footnote that states "the prosecutor did not argue an aiding and abetting theory."

[6] The only pertinent distinction the Attorney General raises between Jesse and Perez is Perez's "grudge" against Diaz, apparently for Diaz's testimony over a year earlier. Given both Jesse and Perez's active participation in smashing Diaz's car (including the destruction of parts such as the side mirrors that had no relation to entry into the vehicle), it is clear that Jesse had ill will toward Diaz. Consequently, we do not believe the circumstantial evidence of Perez's grudge constitutes substantial evidence that Perez *and not Jesse* reached into Diaz's car to take the insulin kit.

prosecution case, but does not independently provide any evidence that Perez was responsible for the theft. (See *People v. Myles* (1975) 50 Cal.App.3d 423, 429 [reversing conviction for receipt of stolen property as unsupported by substantial evidence where defendant "was but one of several persons at the location who were seen looking into the trunk" containing the stolen property].) Given the state of the evidence, the jury was left to speculate as to whether Perez or Jesse reached into Diaz's car to take the insulin, and such speculation cannot support a guilty verdict.

In sum, there is no substantial evidence in the record demonstrating that Perez, as opposed to Jesse, entered Diaz's vehicle with an intent to commit a theft. Consequently, in light of the jury's instructions, which permitted conviction only upon evidence that Perez entered the car, Perez's burglary conviction must be reversed.

DISPOSITION

Perez's vandalism conviction is affirmed. His conviction for second degree burglary is reversed and the matter is remanded for resentencing.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

MCDONALD, J.